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COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Tenth session

SUMMARY RECORD OF THE 12th MEETING

Held at the Palais des Nations, Geneva,
on Monday, 9 May 1994, at 3 p.m.

Chairperson: Mr. ALSTON

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Kenya

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The meeting was called to order at 3.05 p.m.

RELATIONS WITH UNITED NATIONS ORGANS AND OTHER TREATY BODIES (agenda item 6) (continued)

1. Mr. HARRIS (Council of Europe) said that he would endeavour to answer the questions put to him, as a member of the Committee of Independent Experts of the European Social Charter, by the Committee at the preceding meeting.

2. With regard to the effects of privatization on the protection of economic and social rights, he said that his Committee had faced the issue in the context of privately run prisons; they had considered what the ramifications would be if forced labour - prohibited under article 1.2 of the European Social Charter - was found to have occurred and concluded that a State had the obligation to ensure that prisoners' rights were respected; it was obliged to have the legislation and practice in place to control the functioning of such a prison. His Committee had not directly dealt with the effects of privatization in other contexts, but clearly they could apply to other issues, such as the environment; article 11, concerning the right to health, might, for example, apply to the recent privatization of water supplies in the United Kingdom. The same applied to medical services, if they were privatized: the State should have controls in place.

3. With regard to the interrelationship between the European Social Charter and the European Convention on Human Rights, he said that, as both institutional structures were aware, there were both overlaps and differences of emphasis. Each structure bore in mind the jurisprudence of the body operating the other structure. The closed shop was a case in point: there was an overlap between article 5 of the Charter, on the right to organize - including the negative right not to be a member of a trade union - and article 11 of the European Convention. In that case, the European Court of Human Rights had referred to the jurisprudence of the independent experts in both structures and had brought the two articles into line with each other. There were also overlaps between article 16 of the Charter and article 8 of the Convention, which both dealt with family rights: both the right to respect for family life and the right to family housing. Both bodies had drawn on the respective articles in questioning cases of deportation involving the separation of a person from his family and of the destruction of family housing.

4. On the question about the composition of his Committee, he said that the majority of the seven members were professors: of labour law, international law and social security law. Another member had, when appointed, been the president of the social section of the French Conseil d'état; another had been a judge in the Swedish Administrative Court. The Chairman of the Committee was Spanish, the Vice-Chairman French and the Rapporteur Italian; the other members came from the Netherlands, Spain, Sweden and the United Kingdom. His Committee met seven times a year, for a week at a time. Its workload was, however, increasing inexorably, as the number of contracting parties increased, and the Committee feared it might have to meet more often.

5. He had been asked whether he saw a real, honest prospect that the proposal for a protocol allowing individuals to complain under the Covenant

would be accepted. He was not optimistic; he himself had raised it in his Committee and the prospect had scarcely been countenanced. The focus was entirely on collective complaints, if any complaints procedure was to be adopted at all. Different degrees of respect for social and economic rights were to be found among western European States, but he felt that only Sweden and the Netherlands might support the right of individual complaint. Part of the argument that was used against the proposal was on the basis of the theory that social and economic rights were not justiciable. He considered that a misconception: he believed that everything turned on the obligations that were imposed, whatever the context, rather than the nature of the rights concerned. Many cases pertaining to social and economic rights went before national courts and he saw no reason why they should not be made the subject of international remedies of the same kind.

6. With regard to the concept of social and economic rights being dynamic in nature, developing progressively, he said that whereas article 2 of the Covenant saw obligations in dynamic terms, with each State starting at the point where it found itself, the European Social Charter generally imposed immediate obligations, such as the obligation to ensure two weeks' holiday with pay or reasonable working hours. Once States had ratified the Charter those obligations were incumbent on them, regardless of their economic circumstances. The Charter did, however, contain some provisions which were more loosely phrased and, he thought, were preferable because they allowed a dynamic approach. One such was article 2.1, which provided for reasonable working hours. With such a provision it was possible to reduce the maximum that could be tolerated, as circumstances permitted. In that case, the maximum level permitted in the past had been over 50 hours a week with overtime, but had been reduced to below 50. He added that there was only one provision in the Charter which was differential according to States, namely article 4.1, which stipulated that people should receive wages sufficient to provide them with a decent standard of living. His Committee had a simple formula to determine whether that article was being complied with: since people judged their standard of living by reference to their surroundings, to what their neighbours received, his Committee had decided that those earning less than 68 per cent of the average wage in that country were not achieving a decent standard of living. Some in his Committee, however, had developed serious doubts regarding that formula because it did not take account of the difference between States where there was an equality of wages and States where there was a wide spread of wages. Thus the Netherlands, where the average wage was much higher than in some other countries, was none the less in breach of article 4.1 of the Charter because it had a wide spread of wages. His Committee was reconsidering its approach.

7. As for the suggestion that the Committee, the Committee of Independent Experts of the European Social Charter and the International Labour Organisation (ILO) should get together on a regular basis, he believed that such meetings could be fruitful. They might, indeed, include other specialized agencies, although the ILO, which contributed greatly to the functioning of the Charter, was obviously the most relevant. In that context, several members of his Committee had said that they would welcome a representative from the Committee on Economic, Social and Cultural Rights addressing a meeting of the Committee of the European Social Charter.

Meetings between the secretariats of the two institutions would also be helpful. Most important, however, would be a regular exchange of documentation.

8. In response to Mr. Texier's question regarding the way the European Social Charter was seen in relation to individual human rights - how the Committee of the Charter viewed States' obligations in terms of violating human rights - he pointed out that all the prefaces to the articles in Part II of the Charter referred to rights. That being so, his Committee, in considering whether an obligation was complied with, was thereby at the same time seeing whether a right was being respected or not. That was usually as far as it went. It was hesitant with regard to one provision, however: when dealing with requirements under article 1.1 it had not, over the previous decade, made any determination whether there had been a breach on the part of States. The reason was that the article in question had clear political overtones, in that the Contracting Parties undertook to "accept as one of their primary aims and responsibilities the achievement and maintenance of as high and stable a level of employment as possible, with a view to the attainment of full employment". His Committee had taken the view that the provision was so central to a State's policy that it was not appropriate to determine non-compliance with the article. In his own view it had been a cowardly line to take.

9. Responding to another question, he said that on the whole States did submit reports, though sometimes they were late in doing so. Two or three reports currently being awaited were nine months late and in the past his Committee had had to wait up to a year. It was a matter for concern. Greater problems arose with regard to the adequacy of information; additional information frequently had to be requested. On oral hearings, he had been impressed by the robustness of the Committee's questioning and the significant part oral hearings clearly played in its procedure. His Committee had only recently introduced provision for oral hearings - the first had been conducted with Turkey in May 1993 - but it had not been as trenchant as the proceedings he had observed within the Committee, from which he hoped to learn.

10. Lastly, he dealt with the question of how States coped with the costs of their obligations on economic and social rights, especially at a time of economic recession. He recognized that it could be difficult, which was one reason why States were given the choice, when ratifying the Charter, not to accept all its provisions. If a State ratified the whole, however, it had to comply with its obligations, assuming that the costs involved had been clear from the outset. Noting that whereas in the early years of the Charter economies had expanded the situation had changed in the mid-1970s and again, even more dramatically, in recent years, he said that so far his Committee had made no allowances for changed circumstances, in the sense that it applied the same criteria as before. It still contrasted a country's cost of living with the available social assistance, housing benefits and child benefits to see if there was a reasonable relationship between them. It was aware, however, that it was a real problem for States.

11. The CHAIRPERSON said that the Committee took note that future collaboration between the two Committees was possible. He suggested that the ILO could be requested to host a meeting between all three parties, although

he believed that the ILO sometimes sought to insulate its Committee of Experts on the Application of Conventions and Recommendations from contact with other bodies. Collaboration would be useful because the parties faced the common challenge, as pointed out by Mr. Grissa and others, of satisfying people's changing perceptions of minimum social entitlements and rights.

12. Mr. HARRIS (Council of Europe) stressed that the ILO made an invaluable contribution to his Committee's work, particularly in respect of economic rights, on which the ILO had expertise stretching back over many years. Despite adequate secretarial backup, his Committee had difficulty in establishing a bank of information on comparative standards, even though Europe was comparatively small. The ILO had recently been able to guide his Committee on various issues relating to maternity leave and, in another case, had made the Committee aware of current expectations of what constituted a reasonable period of notice before dismissal.

13. The CHAIRPERSON said that that raised questions relating to freedom of association. Whereas the ILO had generated extensive jurisprudence to show what treatment could or could not be meted out to trade unions, there was no such distillation in the social area. Without necessarily wishing for binding jurisprudence, he considered that an illustrative jurisprudential analysis would be valuable for issues of concern to both Committees. He added that he sensed an element of competition with the ILO, which wanted to keep its expertise to itself; it would, however, be to its advantage if it made allies and provided the Committee with the kind of substantive assistance it gave to the Committee of the European Social Charter.

14. The meeting was suspended at 3.35 p.m. and resumed at 3.40 p.m.

CONSIDERATION OF REPORTS (agenda item 4) (continued)

(a) REPORTS SUBMITTED BY STATES PARTIES IN ACCORDANCE WITH ARTICLES 16 AND 17 OF THE COVENANT

Initial report of Kenya (E/1990/5/Add.17; E/C.12/1993/6)

15. At the invitation of the Chairperson, Mr. Nanjira, Mr. Chepsiror and Mr. Mburu (Kenya) took places at the Committee table.

16. The CHAIRPERSON said that the consideration of the report of Kenya had a complicated history. The Committee had considered that country on the basis of the non-receipt of any report by Kenya since its ratification of the Covenant in 1976. After making many requests for a report to be submitted, the Committee had proceeded to adopt a set of concluding observations (E/C.12/1993/6). In August 1993, however, a report had been received (E/1990/5/Add.17). The Committee's concluding observations would act as a framework for its consideration of the report, particularly since, in line with its usual practice in the absence of a report, no list of issues had been drawn up.

17. Mr. NANJIRA (Kenya) said that before reporting on the current implementation status of the Covenant in his country, however, he felt obliged to draw attention to the invaluable contribution of one man to the improvement

of the quality of life of every Kenyan at every level of society. That man was the President of Kenya, Daniel Toroitich Arap Moi. It was incomprehensible that his crusade for the happiness of humankind was so little understood. He had spent 40 years of his life in the service of his people, yet had gained very little recognition. Despite a harsh freeze of financial assistance for development and despite unfounded allegations of human rights violations, he had uplifted the living conditions of the Kenyan people. His concern had always been for the most vulnerable strata of society. He had sought to introduce a fair system of government. He had tirelessly tried to get all Kenyans to pull together for their welfare, peace, love and unity in a multiracial and multicultural society. He tackled drought and other natural disasters, disease, ignorance and poverty with determination and sound planning. His foresight led him to predicate national development on peace and stability.

18. At the request of Mr. KOUZNETZOV, the CHAIRPERSON asked the Kenyan representative to confine himself to reporting on the implementation of the Covenant in Kenya.

19. Mr. NANJIRA (Kenya) pointed out that the institutions dealing with the implementation of the Covenant in Kenya were the Government and the President of the Republic. He was thus carrying out his terms of reference, namely, to explain what had happened since Kenya had acceded to the Covenant in January 1976.

20. Before addressing himself specifically to the documents before the Committee, he wished to point out that one of Kenya's worst difficulties - probably in common with many other States parties - had been its lack of expertise in preparing such reports. The Kenyan authorities would be making a formal application for advisory services in the form of technical assistance on report writing. In order to be relevant, however, such advisory services would have to be provided in the problem areas identified by the Government.

21. In recent years, Kenya had been subjected to much unfair external pressure, a glaring example of which had been the freeze on financial flows imposed in 1991 on the pretext of, inter alia, human rights violations. The actual victims of those measures had been the innocent population of the country. Those problems, compounded by other factors beyond the control of the Kenyan Government, such as protectionism, debts and debt-servicing, structural adjustment prescriptions and the falling prices of commodities had adversely affected the Government's ability to improve the quality of life of the Kenyan people. Those facts largely explained the late submission of the report on implementation of the Covenant in Kenya.

22. Nevertheless, a report (E/1990/5/Add.17), had been submitted after the Committee had discussed the Kenyan situation in May 1993 and prepared its concluding observations (E/C.12/1993/6). He was confident that most of the queries and recommendations in that document had been answered in the report of Kenya and that if that report had reached the Committee before its consideration of Kenya's implementation record, it would have sufficed. Should, however, the Committee believe any additional information to be

necessary, the request would be noted and replies provided at the current session or, in the case of questions requiring elaborate responses, referred to his authorities for further information.

23. Concerning the concluding observations in document E/C.12/1993/6, the Committee might well in future check on information it received from sources other than the Government itself and initially analyse the data received before reaching any conclusions. Reliance on press reports, stories from non-governmental organizations and allegations by individuals or opposition politicians raised serious issues of credibility. The Permanent Mission of Kenya was always ready and able to provide accurate and verifiable information on alleged human rights violations.

24. Moreover the Government of Kenya should not be blamed for factors beyond its control, as was the case in some of the conclusions in paragraph 5 of document E/C.12/1993/6. He was referring in particular to phrases such as "severe political as well as economic turbulence". What were the "numerous obstacles set up by those in power"? What was meant by "pervasive State interventionism"? How could any Government in its right senses "mismanage" things deliberately?

25. It was most unfair to blame the Kenyan Government for events and situations beyond its control, like the economic malaise of the world, unemployment, poverty and structural adjustment problems, as was done by implication on page 3 of document E/C.12/1993/6.

26. Freedom of speech and of expression could not be equated with immorality. Family, cultural and moral values were sacrosanct to Kenyans. Other cultures might allow for immoral practices but Kenya would not, for to do so would totally distort its concept of rights and duties and its cultural and customary heritage.

27. He thanked the Committee for giving him the opportunity to present his Government's case on the application of the Covenant in the Kenyan context.

28. The CHAIRPERSON invited comments on the written report and oral presentation of Kenya.

29. Mr. GRISSA pointed out that the report (E/1990/5/Add.17) did not answer the Committee's questions but merely gave a list of laws. The fact that legislation existed did not mean that problems were addressed in an appropriate manner. No details had been provided on how the rights to education, health, housing and so on were implemented, and there was no information on labour problems. He wished to know something about the practical circumstances in Kenya, not merely the legal system.

30. Mr. TEXIER agreed with Mr. Grissa that the report was not satisfactory because it was too general and did not give a detailed description of the situation in Kenya with respect to the implementation of the rights under the Convention. While welcoming the fact that Kenya had agreed to embark on a dialogue with the Committee, he was at a loss as to what procedure the Committee should adopt, since the Kenyan representative had indicated that his delegation would be unable to answer specific questions immediately.

31. Mr. RATTRAY thanked the Kenyan delegation for having been present and for introducing the report. It was clear, however, that Kenya needed technical assistance in preparing a report that would be responsive to the Committee's revised guidelines (E/C.12/1991/1) and give it a greater appreciation of the practical application of the Covenant. He agreed with Mr. Texier that it was very difficult to embark on a dialogue with the State party on the basis of a report that did not meet the Committee's requirements.

32. The CHAIRPERSON said that there seemed to be a consensus on the need for the provision of advisory services to Kenya to allow a detailed report to be produced on the basis of the guidelines. He suggested that the Committee might request that an expert be appointed as early as possible and a report submitted to the Committee at a subsequent session.

33. Mr. SIMMA, speaking as the member of the Committee responsible for drafting the concluding observations referred to by the representative of Kenya (E/C.12/1993/6), pointed out that it was the fault of the State party that those concluding observations had been made. In that connection, he referred to paragraph 3 of the document, to the effect that non-submission of reports and non-appearance before the Committee deprived a Government of the possibility of setting the record straight.

34. It would not have occurred to him to request information from the Permanent Mission of Kenya in drafting those observations. He had taken the silence of the Government as an expression of its intention not to present a report and had assembled information to the best of his ability, in good faith.

35. The Committee was in a difficult position because the report drawn up in response to the concluding observations did not even refer to those observations. For the purpose of embarking on a constructive dialogue with Kenya he found the report useless; moreover, it was not drawn up in accordance with the Committee's guidelines.

36. He suggested that one way for the Kenyan delegation to engage in a dialogue with the Committee would be for it to give further information on the principal subjects of concern raised in section E of document E/C.12/1993/6. In particular he would like to have information on how the rights under the Covenant were implemented in Kenya's domestic legal order.

37. States parties had been asked to provide a core document containing information of relevance to all the human rights bodies. An important part of that document was information on effective ways in which the legal order of a State party implemented human rights. In that connection, he referred to an article in volume 13 No. 3 of African Studies by Professor Stanley Ross on the role of the Kenyan courts in the protection of human rights which stated that: "Chapter V of the Constitution is entitled 'Protection of Fundamental Rights and Freedom of the Individual'. Although these provisions are Kenya's 'Bill of Rights', the High Court has held that it has no jurisdiction to enforce them, in direct conflict with the clear language of section 84 of the Constitution, which grants redress before the High Court for violation of any of its provisions. The High Court has also held that post-independence legislation can prevail, in certain circumstances, over constitutional

provisions even though, under section 3, the Constitution is the supreme law of the land, and prevails over any law which is inconsistent with its provisions". In a footnote the author stated that: "One way the courts avoid dealing with these issues is finding that a violation of a specific constitutional right is not justiciable".

38. The article also referred to the role of expatriate judges in human rights enforcement in Kenya. In 1987 Justice Schofield had refused to renew his fixed-term contract with the judiciary, saying that: "I cannot operate in a system where the law is so blatantly contrived by those who are supposed to be its supreme guardians". Ironically, the denial of human rights was sometimes facilitated by expatriate judges with no allegiance to Kenya and it had been alleged that they brought down judgements favourable to the Government in order to protect their position, status and security.

39. The article also quoted a conclusion of the Washington Post correspondent stationed in Nairobi in 1990 that there was "a consistent pattern of presidential interference in the judicial process. In my four years in the country, the Government did not lose one case in which Moi had an interest. Prosecutors won more than 80 sedition trials - all on guilty pleas."

40. Effective implementation of human rights presupposed an independent judiciary. According to his information, the judiciary in Kenya was not independent, and he asked for the delegation's views on that matter.

41. Mr. NANJIRA (Kenya) agreed that his Government's report had been long delayed. Since the Committee had found it too brief, Kenya would be glad to have technical assistance in producing a second periodic report that followed the guidelines, and intended to send a formal request to that effect to the Centre for Human Rights. The issues that needed more elaboration would be dealt with much more comprehensively, and Kenya would welcome questions from the Committee so that they could be answered in the next report, which, in fact, the Government had already begun to draft. The initial report, incidentally, had been prepared before his Government had received the concluding observations of May 1993 from the Committee.

42. In answer to Mr. Simma, who had cited allegations of interference by the President with the rule of law, he assured the Committee that they were untrue. It could not be said that the Kenyan courts were not independent.

43. Mr. MBURU (Kenya) reiterated the baselessness of the contention that the Kenyan courts always found in favour of the Government in judicial proceedings. One needed only to refer to the many press accounts in Kenya itself of court cases, both civil and criminal, where the Government had lost and been forced to pay damages. The remedy of habeas corpus was available in Kenya and the police were regularly compelled to produce suspects. The Constitution itself was the supreme law of the land and no legislation had ever prevailed over Chapter III of the Constitution.

44. As to the supposed lack of independence of expatriate judges acting in an environment that consistently contravened the law, that particular allegation was no more than just that. The expatriate judges, with security of tenure

and with salaries paid by Britain, were logically the most independent of all. His delegation knew of no case where a judge had not followed constitutional procedures.

45. Mr. GRISSA proposed that, since Kenya had already begun to prepare a more comprehensive report, the Committee should defer any further dialogue until that report was received. It was difficult even to find any common ground on which members might make comments and there was no use in going on.

46. The CHAIRPERSON observed that the exchange thus far had clarified that the Committee's concluding observations had not been systematically addressed in the report under consideration, or the Committee's guidelines followed, but also that the Government of Kenya would warmly welcome advisory services in preparing its next report. He therefore suggested that the Committee should conclude by making a formal request to the Centre for Human Rights for such technical assistance to be provided to Kenya at the delegation's request. The Government would also be asked to submit its next report before the Committee's next session.

47. It was so decided.

48. Mr. SIMMA said that, in addition to the issues raised in the Committee's concluding observations adopted in May 1993, some members had specific concerns based on information received subsequently, which it would also like Kenya to address in its report.

49. In relation to article 11 of the Covenant, for instance, information published in August 1993 by EPD, the press service of the Evangelical Church in Germany, indicated that there were marked regional disparities in Kenya's development strategy, favouring Nairobi and the Kikuyu-dominated areas like the central part of the country. It also indicated that there was a very extensive informal sector in Kenya - constituting the so-called "under the hot sun" economy - in which, according to 1992 figures from Kenya's Central Bureau of Statistics, half a million workers were involved. Full information was needed on working conditions of those people, who laboured without contracts, minimum wages or labour guarantees of any kind. The living conditions of the most vulnerable groups were always of special concern to the Committee. On the question of housing, he wished to bring to the attention of the Government a document of 25 April 1994 from Foodfirst Information and Action Network (FIAN), indicating that Kenya had carried out large-scale, forced evictions of hundreds of thousands of ethnic groups in the Rift Valley area, without proper relocation. Such breaches of housing and land rights were also of serious concern.

50. In connection with article 12 of the Covenant, the German Evangelical Church document indicated that in Kenya three quarters of a million were infected with the HIV virus and that there were more than 30,000 full-blown AIDS cases, occupying up to 40 per cent of the country's hospital beds, yet the Kenyan Health Administration consistently played down the problem so as not to deter tourists. That Administration was apparently also not taking any enlightened AIDS-prevention action, thus putting economic benefit before the lives of innocent people. He would appreciate a comment on the matter from the Government.

51. Concerning article 8 of the Covenant, the most recent report of the ILO Committee on Freedom of Association of the International Labour Organisation (document GB/259/7/14) gave an account (paras. 469 et seq.) on the Mugalla case, involving the detention of that prominent trade union leader, on which the Government should also comment.

52. He would furnish all three documents to the Kenyan delegation and would like his remarks to be dealt with as issues to be addressed formally by the Government in its forthcoming report.

53. Mrs. JIMENEZ BUTRAGUEÑO said that she strongly endorsed the request for comments by Kenya on the information just cited by Mr. Simma.

54. Mr. TEXIER said that he too associated himself with Mr. Simma's queries, especially regarding the mass evictions of more than 300,000 people in the Rift Valley, which, if they had not been ordered by the Government had at least been tolerated, and which, by violating so basic a right as housing, actually affected the whole range of cultural rights. A very specific reply by the Government was required.

55. Mr. NANJIRA (Kenya) said that he was very grateful to the experts for the clear indication of what they expected, and he would ensure that all their queries were addressed. Kenya had nothing to hide. The Government had had practical problems in drafting a report but, if given technical assistance and clear queries, it would furnish a comprehensive report.

56. The CHAIRPERSON said that the Committee had concluded its consideration of the initial report of Kenya (E/1990/5/Add.17).

57. Mr. Nanjira, Mr. Chepsiror and Mr. Mburu (Kenya) withdrew.

The meeting rose at 5.10 p.m.